Office-Supreme Court, U.S.
FILED
JUN 29 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-2016

In the Supreme Court of the United States

October Term, 1980

JAMES P. FRACKELTON,
Petitioner,

vs.

GUS SWANSON, VIRGINIA SWANSON,
SHIA SHAPIRO,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
OHIO SUPREME COURT

RESPONDENT, SHIA SHAPIRO'S, BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

I. Whether the petitioner sufficiently and properly raised the federal questions in the state courts so that the state courts could consider and pass upon the federal questions thereby properly invoking the jurisdiction of this Court under 28 U.S.C.A. Section 1257(3).

II. Whether the long standing requirement under Ohio common law that an individual asserting a claim for malicious prosecution must allege as an element of damage either arrest of his person or seizure of his property constitutes a denial to that individual of due process of law and equal protection of the law as guaranteed by the Fourteenth Amendment to the United States Constitution.

III. Whether the petitioner has been deprived of due process of law or equal protection of the laws as guaranteed by the Fourteenth Amendment to the United States Constitution because he lacked standing to assert a claim for malicious prosecution against respondent Shia Shapiro, the attorney for respondents Swansons.

PARTIES TO THE PROCEEDINGS

The parties to the proceeding in the Supreme Court of Ohio are all those parties listed in the caption of the the case in this Court.

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RESPONDENT, SHIA SHAPIRO'S, BRIEF IN OPPOSITION

CONSTITUTIONAL PROVISION

United States Constitution, Amendment XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

On December 7, 1978, petitioner James P. Frackelton instituted this action by filing a complaint in the Court of Common Pleas of Cuyahoga County, Ohio, setting forth two causes of action: malicious prosecution and abuse of civil process. The complaint alleged that respondents, Gus Swanson and Virginia Swanson, by and through their attorney, respondent Shia Shapiro, maliciously and without probable cause filed a prior lawsuit against the petitioner for breach of warranty and negligence arising out of the petitioner's performance of a vasectomy upon Gus Swanson. After the vasectomy, Virginia Swanson became pregnant and delivered a child. The petitioner obtained a directed verdict at the close of the Swansons' case in the prior lawsuit.

The complaint in this case was dismissed, as to all respondents, for failure to state a claim upon which relief could be granted. The following allegations appeared in the complaint.

On or about May 24, 1974, Gus Swanson and Virginia Swanson caused to be filed, by and through their attorney, Shia Shapiro, a complaint for breach of warranty and negligence against the petitioner. This complaint alleged that the petitioner was negligent in performing a vasectomy upon Gus Swanson, and by this negligence breached warranties concerning the said operative procedure. As a result of the negligence and breach of warranty, Virginia Swanson became pregnant and delivered a child on February 28, 1974.

The instant complaint alleges that at the time of filing the prior lawsuit, it was known to the defendants that laboratory tests conclusively showed that it was medically im-

possible for Gus Swanson to impregnate Virginia Swanson or any other woman. Nonetheless, the respondents maliciously and without probable cause instituted the lawsuit.

The complaint further alleges that prior to the initiation of the litigation and continuing into the discovery stage of the proceedings, the respondents failed to engage a qualified medical expert to support the fabricated theory of negligence and breach of warranty. The trial court, by means of a pretrial order on May 3, 1977, required that such an expert be identified and that if such information was not forthcoming by a certain date, introduction of expert medical testimony at the time of the trial would be barred. On the first day of trial, no qualified expert having been produced to substantiate the unfounded claims, the court granted the petitioner's Motion in Limine barring the respondents from presenting any expert medical testimony on their behalf at the trial. The Motion was unopposed. At the close of the respondents' case, the court granted the petitioner's Motion for a Directed Verdict.

The complaint alleges that during the interim of the prior lawsuit, the petitioner was deprived of not only his mental well-being but his property as well, to-wit: The pressure from said lawsuit mandated his resignation as Chairman of the Department of Family Practice at Fairview General Hospital; his insurance premiums increased significantly, and he was eventually forced to switch from an occurrence policy to a claims made policy; and great sums of money were spent for hospitalization because of the mental trauma occasioned by the filing of the lawsuit. The complaint further alleges that the petitioner was caused to suffer great indignity, embarrassment, humiliation, nervousness and inability to concentrate in his professional activities. Petitioner was injured in his property through increased costs of insurance coverage for medical malpractice and loss of business.

In paragraph 8 of the complaint, it is alleged that respondents' conduct in preparing and filing the aforementioned complaint and continuing to pursue said action against plaintiff without adequate preparation and investigation was reckless, willful, wanton and malicious, and constituted a clear abuse of civil process and malicious prosecution.

The complaint lacked any allegation that, as a result of the prior lawsuit, the petitioner was arrested, had property seized as a result of judicial process, was the subject of a forcible entry and detainer, or that the respondents caused a temporary restraining order or injunction to be issued against the petitioner. There was no allegation that the defendants improperly or wrongfully used any process issued in the prior lawsuit. These are essential allegations for maintenance of a malicious prosecution or abuse of civil process action in Ohio.

Because of the petitioner's failure to allege all of the essential elements necessary to state a claim for malicious prosecution or abuse of civil process, respondents Swanson and respondent Shapiro each filed a Motion to Dismiss the Complaint, pursuant to Rule 12(B)(6) of the Ohio Rules of Civil Procedure (A. 17), for failure to state a claim upon which relief can be granted. Respondent Shapiro, as the Swansons' attorney, was also immune from claims based upon malicious prosecution or abuse of civil process. In his Brief in Opposition to the Motions to Dismiss, the petitioner raised no constitutional issues. (This Brief has been lodged with the clerk of the Supreme Court.)

In separate orders journalized on January 3, 1980, the trial court granted the Motions to Dismiss. The complaint was dismissed with prejudice. The trial court did not write an opinion.

The petitioner appealed the trial court's decision to the Court of Appeals for the Eighth Appellate District. The petitioner did not raise any error that the judgment of the trial court was in contravention of petitioner's rights under the 14th Amendment to the United States Constitution in his Assignment of Error and Brief filed in the Court of Appeals. (This Brief has been lodged with the Clerk of the Supreme Court.) The Court of Appeals affirmed the judgment of the trial court.

The petitioner then moved the Supreme Court of Ohio for an order directing the Court of Appeals to certify its record and concurrently filed an appeal as of right to the Supreme Court of Ohio. The alleged deprivation of due process and denial of equal protection was raised by the petitioner for the first time in his Memorandum in Support of Jurisdiction to the Supreme Court of Ohio. The petitioner's only reference to the alleged constitutional violations was that:

> Application of the strict English rule deprives successful defendants in Ohio of due process and equal protection as afforded them under the constitution of the United States and Ohio. It established a separate classification of litigants and denies them entry to the court system and a remedy for their wrongs.

The Supreme Court overruled the motion to certify and *sua sponte* dismissed the appeal for the reason that no substantial constitutional question existed.

The Ohio courts applied long-standing and well established Ohio law with respect to the elements necessary to properly plead and maintain an action for malicious prosecution. Contrary to petitioner's erroneous statement in his Petition, the federal question was not raised by petitioner until his appeal to the Supreme Court of Ohio.

SUMMARY OF ARGUMENT

The federal question presented by petitioner for review was not raised by petitioner in the Court of Common Pleas or in the Court of Appeals in the state court. It was not until petitioner appealed to the Ohio Supreme Court that he raised the federal question. The constitutional issues raised in the federal question were not properly before the Ohio Supreme Court, were not considered by the Ohio Supreme Court and the dismissal of petitioner's complaint was affirmed on grounds of state law. Therefore, the petitioner has not properly invoked the jurisdiction of this Court under 28 U.S.C.A. Section 1257(3) and the Petition for a Writ of Certiorari must be dismissed.

The Ohio law on malicious prosecution is based on common law and is long standing. The petitioner asks this Court to create a national cause of action for malicious prosecution—a request which is clearly improper as malicious prosecution is a matter of state law. The petitioner was treated equally with all other malicious prosecution plaintiffs in Ohio and has not been denied equal protection of the laws. The petitioner was afforded due process of law in the alleged malicious litigation. The petitioner does not have a property right or a claim of entitlement to being able to maintain a malicious prosecution claim. Since he had no prior right to maintain the action then he has not been deprived of due process of law. The states' interest in maintaining free, unfettered access to the courts is sufficient justification for limiting the scope of malicious prosecution.

Nor was petitioner deprived of any constitutional rights by his lack of standing to state a claim for malicious prosecution against respondent Shia Shapiro, the attorney for respondents Swansons. Ohio law is clear that the malicious

prosecution claim, if at all, can only be maintained against the Swansons not their attorney. The attorney's duty is to his clients not the petitioner. The potential chilling effect on the zealous representation which an attorney owes to his clients is sufficient justification for not permitting the petitioner to maintain a malicious prosecution claim against respondent Shia Shapiro.

ARGUMENT

I. THE PETITIONER FAILED TO PROPERLY INVOKE THE JURISDICTION OF THIS COURT UNDER 28 U.S.C.A. SECTION 1257(3) BY FAILING TO SUFFICIENTLY AND PROPERLY RAISE THE FEDERAL QUESTIONS IN THE STATE COURTS.

The petitioner seeks to invoke the jurisdiction of this Court by virtue of 28 U.S.C.A. Section 1257(3) which provides that:

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> * * * * *
>
> (3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.

In order to properly invoke this Court's jurisdiction under 28 U.S.C.A. Section 1257(3), it is mandatory that the petitioner raised the federal question in the state courts so that the issues could have been considered and passed upon prior to review by this Court. If the federal question was not properly raised in the state courts then this Court has no power to consider it. The rule was stated in *Sidney Street v. State of New York*, 394 U.S. 576, 581, 582 (1969):

> Hence, in order to vindicate our jurisdiction to deal with this particular issue, we must inquire whether that question was presented to the New York courts in such a manner that it was necessarily decided by the New York Court of Appeals when it affirmed appellant's conviction. If the question was not so presented, then we have no power to consider it. See 28 USC §§ 1257(2), 1257(3); Bailey v. Anderson, 326 U.S. 203, 206-207, 90 L Ed 3, 5, 6, 66 S Ct 66 (1945). Moreover, this Court has stated that when, as here, the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in this Court can affirmatively show the contrary.

Bailey v. Anderson, 326 U.S. 203 (1945); *Pennsylvania Railroad Co. v. Illinois Brick Co.*, 297 U.S. 447 (1936); *Chicago, I. & L. R. Co. v. McGuire*, 196 U.S. 129 (1905).

The petitioner has the burden of showing that the Ohio Supreme Court properly considered and ruled upon the federal questions. This the petitioner has failed to do. Furthermore, the federal questions were not properly brought before the Ohio Supreme Court.

The petitioner's Brief in Opposition to the Motions to Dismiss, which was filed in the Common Pleas Court, and

the petitioner's Assignments of Error and Brief filed in the Court of Appeals, *did not* raise the federal questions at any time, e.g. the petitioner's claim that the Ohio law on malicious prosecution which requires an arrest of person or seizure of property as an element of damage in the prior lawsuit constitutes a violation of the due process of law and equal protection clauses of the Fourteenth Amendment. This issue was not raised until petitioner filed his Memorandum in Support of Jurisdiction in the Ohio Supreme Court. And even then, the issue was only one of six (6) "propositions of law" before the Ohio Supreme Court. The petitioner has not and cannot show that the Ohio Supreme Court even considered the federal question in overruling petitioner's motion to certify and dismissing his appeal.

The Ohio Supreme Court does not consider any claim of error which was not raised in the Court of Appeals. The rule is set forth in paragraph 3 of the syllabus in *State, ex rel. Babcock v. Perkins,* 165 Ohio St. 185 (1956):

> 3. Where an appeal on questions of law is taken to the Supreme Court from the Court of Appeals, which latter court had jurisdiction of the subject matter of and the parties to the action, the Supreme Court will not consider or determine claimed errors which were not raised and preserved in the Court of Appeals.

The syllabus of an opinion of the Ohio Supreme Court states the law in Ohio. *Perkins v. Benquet Consolidated Mining Co.,* 342 U.S. 437 (1952). Nor does the fact that the petitioner is raising a constitutional question alter the rule. *State v. Williams,* 51 Ohio St. 2d 112 (1977). Since the petitioner did not raise the federal question in the Common Pleas Court or Court of Appeals then it was not properly before the Ohio Supreme Court and was not a basis for the Ohio Supreme Court's decision.

Therefore, the petitioner, by failing to properly raise the federal question in the state courts, has not invoked the jurisdiction of this Court under 28 U.S.C.A. Section 1257(3). The Petition for a Writ of Certiorari must be dismissed.

II. THE OHIO COMMON LAW REQUIREMENT THAT A COMPLAINT ASSERTING A CLAIM FOR MALICIOUS PROSECUTION MUST ALLEGE THAT THE PLAINTIFF WAS ARRESTED OR HAD PROPERTY SEIZED AS A RESULT OF JUDICIAL PROCESS ISSUED IN THE PRIOR LAWSUIT DOES NOT VIOLATE THE DUE PROCESS OF LAW OR EQUAL PROTECTION CLAUSES OF THE FOURTEENTH AMENDMENT.

The elements necessary to state a claim for malicious prosecution are firmly entrenched in Ohio law. One essential element is that the plaintiff must have been arrested or had property seized as a result of judicial process issued in the alleged malicious lawsuit.

This well established principle of Ohio law was succinctly stated in Paragraph 1 of the syllabus in *Cincinnati Daily Tribune Co. v. Bruck*, 61 Ohio St. 489 (1900):

> As a general rule no suit will lie for the malicious prosecution of a civil action, where there has been no arrest of the person or seizure of property.

This "arrest or seizure of property requirement" has been consistently applied by the courts in Ohio. *Skarbinski v. Henry H. Krause Co*, 378 F.2d 656 (6th Cir., 1967); *Dakters v. Shane*, 64 Ohio App. 2d 196 (Lorain Cty., 1978), *m.c.o.* (September 7, 1978); *W.D.G., Inc. v. Mutual Manufacturing & Supply Co.*, 5 Ohio Op. 3d 397 (Ohio App., Franklin Cty., 1976); *Avco Delta Corp. v. Walker*, 22 Ohio

App. 2d 61 (Franklin Cty., 1969); *Delk v. Colonial Finance Co.*, 118 Ohio App. 451 (Hamilton Cty., 1963); *Perry v. Arsham*, 101 Ohio App. 285 (Cuyahoga Cty., 1956); *Board of Education v. Marting*, 7 Ohio Misc. 64 (C.P. Madison Cty., 1966). The petitioner's complaint failed to allege this essential element and it was appropriately dismissed.

The reasons for the rule were succinctly stated by the Court of Appeals in petitioner's case:

> While the Ohio rule represents a minority view, important policy considerations support its continued application. First, litigants should have ready access to courts without risking liability for unsuccessful suits. Second, were suits for malicious prosecution more easily used, disputes in litigation would tend to be perpetuated rather than be concluded. While other elements must be proved in an action for malicious prosecution, the availability of a remedy for purported malicious prosecution without the arrest of a person or seizure of his property would loom as an uncertain threat against plaintiffs, discouraging their pursuit of bona fide claims (page 4).

Additional reasons were set forth in *Perry v. Arsham*, 101 Ohio App. 285 (Cuyahoga Cty., 1956). Clearly though, the policy considerations concerning the potential chilling effect on the open, unfettered access to the courts are the most important.

The petitioner argues that he has been denied equal protection of the laws because he was unable to state a claim for malicious prosecution. The petitioner says that "[p]erpetuation of the restriction in Ohio contrasted with relief from that restriction in other jurisdictions, works an impermissible hardship on malicious prosecution plaintiffs in Ohio, which is not imposed on plaintiffs similarly sit-

uated elsewhere" (p. 7). The petitioner further says that "[t]o afford the right to some, while denying it to others, merely on the basis of geography, is an unlawful discrimination which is condemned by the United States Constitution . . . [t]he right of a physician, or any litigant to seek redress for malicious prosecution should be uniformly applied throughout the United States" (p. 10). For purposes of petitioner's equal protection argument it is clear that the two (2) classes are plaintiffs in the State of Ohio versus plaintiffs in a state which follows the "majority" rule.

The lack of merit of petitioner's equal protection argument is obvious. The Fourteenth Amendment says that no state shall "deny to any person *within its jurisdiction* the equal protection of the laws". The petitioner does not claim that Ohio law discriminates between two (2) classes of plaintiffs in Ohio. And petitioner cannot make such a claim because all malicious prosecution plaintiffs in Ohio are treated equally.

The petitioner is not a member of a "suspect class"; has not been discriminated against because he is a member of a class and has been treated equally with all other malicious prosecution plaintiffs in Ohio. Therefore, the petitioner has not been denied equal protection of the laws.

Nor was petitioner deprived of due process of law because he was unable to state a claim for malicious prosecution. The petitioner claims that he was denied access to the courts thereby depriving him of a property interest without due process of law. The petitioner asks this Court to change the elements of a malicious prosecution cause of action in Ohio so as to allow petitioner to state a claim.

Access to state courts is a property interest protected by the Fourteenth Amendment. *Boddie v. Connecticut*, 401 U.S. 371 (1971). However, as this Court noted in *Boddie*:

> The legitimacy of the State's monopoly over techniques of final dispute settlement, even where some are denied access to its use, stands unimpaired where recognized, effective alternatives for the adjustment of differences remain. 401 U.S. at 375, 376.

The petitioner had an "effective alternative" and, in fact, was afforded due process of law because of his access to the courts. The petitioner obtained a directed verdict against respondents, in the medical malpractice lawsuit, because respondents failed to retain a medical expert to testify at trial. While expert medical testimony is not absolutely necessary in all medical malpractice cases, the courts in Ohio have placed great emphasis on its need. *Alexander v. Mt. Carmel Medical Center,* 56 Ohio St. 2d 155 (1978); *Bruni v. Tatsumi,* 46 Ohio St. 2d 127 (1976). Furthermore, the Ohio Legislature has afforded medical malpractice defendants a special degree of protection by establishing the requisites of a competent medical expert. Rule 601(D) of the Ohio Rules of Civil Procedure (A. 18); Ohio Revised Code Section 2743.43 (A. 18). With this due process afforded petitioner in the medical malpractice suit, the petitioner has no basis for his claim that he has suffered a wrong without a legal remedy or that the State deprived him of due process of law.

This Court has held that property interests are not created by the Constitution. *Board of Regents v. Roth,* 408 U.S. 564 (1972). In *Roth* this Court held that property interests are:

> . . . created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits. 408 U.S. at 577.

Ohio law has always required an arrest or seizure of property in order to state a claim for malicious prosecution. The petitioner failed to allege this essential element and he has no claim of entitlement to maintain the malicious prosecution case. Simply, he has not been deprived of any property interest protected by the Fourteenth Amendment.

Furthermore, the countervailing state interests in affording litigants the free, unfettered access to the courts is justification for maintaining the arrest or seizure of property elements for malicious prosecution. The Ohio courts have a legitimate concern about the potential "chilling effect" on litigants. This Court should not create a new cause of action for malicious prosecution in Ohio. This should be a matter for the Ohio courts or legislature.

III. A MALICIOUS PROSECUTION ACTION MAY NOT BE MAINTAINED BY A THIRD PERSON AGAINST AN ATTORNEY WHO PROSECUTED THE ALLEGED MALICIOUS LITIGATION ON BEHALF OF, AND WITH THE AUTHORITY OF, HIS CLIENTS.

Ohio law states that an attorney is immune from liability to third parties for claims based on malicious prosecution. *W.D.G., Inc. v. Mutual Manufacturing Supply Co.*, 5 Ohio Op. 3d 397 (Ohio App., Franklin Cty., 1976). Due to the unique trust and confidentiality which permeates the attorney-client relationship, and the legal profession itself, the courts cannot be permitted to become an arena for third party to second-guess or sanction an attorney's professional conduct. The Ohio Supreme Court has wisely left such matters to the exclusive jurisdiction of the Code of Professional Responsibility and the disciplinary proceedings contained therein. The legal pro-

fession polices itself—it sets its own standards of professional conduct. If an attorney's conduct is questioned then those standards are available to judge his conduct.

The legal profession operates on the presumption that an attorney will not act with malice and that there is a reasonable and good faith basis for lawsuits filed on behalf of a client. Whether or not the client acts with malice is irrelevant so long as the lawsuit has grounds in law and in fact. If a third party is injured by a malicious unfounded lawsuit then his remedy lies with the client not the attorney. The attorney must answer to his client if he files a lawsuit knowing there was no reasonable grounds in law and in fact—this is malpractice. There is no need to extend the scope of malicious prosecution to permit claims against attorneys.

The Complaint alleged that the medical malpractice action was filed by respondents Swansons "by and through their attorney, Shia Shapiro". There was no allegation that respondent Shapiro was acting in concert or conspiracy with the Swansons. Nor is there any allegation that respondent Shapiro was at any time acting other than as the Swansons' attorney.

Respondent Shapiro's first duty and loyalty was owed to his clients, the Swansons. Any duty owed to petitioner is contained within the Code of Professional Responsibility for which the petitioner does not need a cause of action in malicious prosecution to enforce. The obvious conflict of interest, and the potential "chilling effect" on an attorney's zealous representation of his clients, should attorneys be open to malicious prosecution claims must be avoided.

The petitioner has no right to file a malicious prosecution claim against respondent Shapiro and, thus, has not been deprived of due process of law or equal protection. Petitioner's remedy, if at all, lies with the Swansons not their attorney.

CONCLUSION

The petitioner failed to timely and properly raise the constitutional issues in the state courts. The petitioner's complaint was dismissed, and the dismissal affirmed, on the basis of state law. The petitioner has failed to invoke the jurisdiction of this Court and the Petition for a Writ of Certiorari must be dismissed.

The petitioner has not been deprived of due process of law or equal protection of the laws. The issues raised by petitioner are matters of state law. The petitioner's complaint was dismissed in accordance with state law. The respondents' constitutional rights would be violated by the retroactive application of any new cause of action for malicious prosecution. This Court does not have the power, as petitioner is requesting, to create a federal cause of action for malicious prosecution. The petitioner has been afforded his constitutional rights and the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX

OHIO RULES OF CIVIL PROCEDURE

Rule 12(B)

(B) How presented. Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state a claim upon which relief can be granted, (7) failure to join a party under Rule 19 or Rule 19.1. A motion making any of these defenses shall be made before pleading if a further pleading is permitted. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion. If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, he may assert at the trial any defense in law or fact to that claim for relief. When a motion to dismiss for failure to state a claim upon which relief can be granted presents matters outside the pleading and such matters are not excluded by the court, the motion shall be treated as a motion for summary judgment and disposed of as provided in Rule 56. Provided, however, that the court shall consider only such matters outside the pleadings as are specifically enumerated in Rule 56. All parties shall be given reasonable opportunity to present all materials made pertinent to such a motion by Rule 56.

OHIO RULES OF EVIDENCE

Rule 601(D)

Every person is competent to be a witness except:

* * * * *

A person giving expert testimony on the issue of liability in any claim asserted in any civil action against a physician, podiatrist, or hospital arising out of the diagnosis, care or treatment of any person, unless the person testifying is licensed to practice medicine and surgery, osteopathic medicine and surgery, or podiatric medicine and surgery by the state medical board or by the licensing authority of any state, and unless such person devotes three-fourths of his professional time to the active clinical practice in his field of licensure, or to its instruction in an accredited university.

OHIO REVISED CODE SECTION 2743.43

(A) No person shall be deemed competent to give expert testimony on the liability issues in a medical claim, as defined in division (D)(3) of section 2305.11 of the Revised Code, unless:

(1) Such person is licensed to practice medicine and surgery, osteopathic medicine and surgery, or podiatric medicine and surgery by the state medical board or by the licensing authority of any state;

(2) Such person devotes three-fourths of his professional time to the active clinical practice of medicine or surgery, osteopathic medicine or surgery, or podiatric medicine and surgery, or to its instruction in an accredited university.

(B) Nothing in division (A) of this section shall be construed to limit the power of the trial court to adjudge the testimony of any expert witness incompetent on any other ground.